Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

IN THE
Supreme Court of the United States

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

GARY R. SLEZAK,

Respondent.

On Petition For Writ Of Certiorari
To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the practice of triple celling prisoners implicate a protected liberty interest under the "atypical and significant hardship" standard articulated in *Sandin v. Conner*, 515 U.S. 472 (1995)?

PARTIES TO THE PROCEEDINGS BELOW

The parties that appeared below include Gary R. Slezak who commenced this action and is the Respondent here. The Petitioner is the South Carolina Department of Corrections.

TABLE OF CONTENTS

Question Presented for Review i

Parties to the Proceedings Below ii

Table of Contents iii

Table of Authorities iv

Petition for Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 1

Statement of the Case 2

Reasons for Granting the Writ 3

Conclusion 8

TABLE OF AUTHORITIES

Cases

Albright v. Oliver, 510 U.S. 266 (1994). 5

Keenan v. Hall, 83 F.3d 1083 (9th Cir. 1996). 6

Phillips v. Norris, 320 F.3d 844 (8th Cir. 2003). 6

Rhodes v. Chapman, 452 U.S. 337 (1981). 4

Sandin v. Conner, 515 U.S. 472 (1995). ..... passim

Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993). 4

Williams v. Griffin, 952 F.2d 820 (4th Cir. 1991). 4
5

Wilson v. Seiter, 501 U.S. 294 (1991). 4

Statutes

28 U.S.C. § 1257(a). 1

PETITION FOR WRIT OF CERTIORARI

Petitioner South Carolina Department of Corrections respectfully petitions this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINION BELOW

The opinion of the South Carolina Supreme Court is published at 605 S.E.2d 506.

JURISDICTION

The South Carolina Supreme Court issued its decision on November 1, 2004. A petition for rehearing was subsequently filed. That petition was denied on December 15, 2004.

The United States Supreme Court has jurisdiction of this appeal pursuant to the provisions of 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Respondent, Gary R. Slezak, is a prisoner currently confined at the South Carolina Department of Corrections. The Respondent was convicted in 1982 of armed robbery and two counts of murder. He was sentenced to twenty years for the armed robbery conviction and received a life sentence for the murder convictions. He has completed his sentence for armed robbery but continues to serve the life sentence.

The Respondent filed a number of prisoner grievances which were first adjudicated through internal prison procedures and then appealed to a South Carolina administrative law tribunal and then to the South Carolina Supreme Court. One of those grievances requested that the

practice of triple celling of inmates be ceased. That grievance was denied by the warden of the institution where the Respondent was housed and was likewise denied by the Deputy Director of Operations for the South Carolina Department of Corrections. An administrative law judge later dismissed the Respondent's appeal, a decision which was affirmed on appeal to the Circuit Court.

On further appeal, the South Carolina Supreme Court construed the grievance as alleging that the practice of triple celling constituted a "security hazard" and a "health hazard" to inmates. (App. 5). Citing the rationale of *Sandin v. Conner*, 515 U.S. 472 (1995), the court below concluded that the grievance adequately stated a violation of a protected liberty interest and remanded for a due process hearing before an administrative law judge. A petition for rehearing was subsequently denied by order issued December 15, 2004.

REASONS FOR GRANTING THE WRIT

This case presents this Court with the opportunity to expand upon the meaning of "atypical and significant hardship" as that language is used in *Sandin v. Conner*, 515 U.S. 472 (1995). More importantly, this case presents the opportunity for this Court to define the correlation, or rather the lack thereof, between the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

In the case below, the South Carolina Supreme Court reviewed a number of prisoner grievances to determine whether a liberty interest was implicated so as to require that the Respondent inmate be provided a hearing and other due process safeguards. In determining whether due process protections were mandated, the court applied the liberty

interest analysis adopted by this Court in *Sandin, supra.* The *Sandin* Court held as follows:

> States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

515 U.S. at 483-484.

As the case at bar demonstrates, the "atypical and significant hardship" standard may be easily confused with the concept of cruel and unusual punishment; however, they are not the same and frankly there is no direct or logical correlation between the two analyses. Yet, it was this very misconception that led the court below to conclude that the use of triple cells, where a "security hazard" and a "health hazard" are alleged, constitutes an "atypical and significant hardship" that implicates a protected liberty interest. The court below, however, has confused the presence of conditions constituting cruel and unusual punishment with conditions that are "atypical" when compared to the ordinary incidents of prison life.

Courts that have addressed the constitutionality of the practice of triple celling have held that the practice is not *per se* unconstitutional." *See e.g., Strickler v. Waters*, 989 F.2d 1375, 1382 (4th Cir. 1993); *Williams v. Griffin*, 952 F.2d 820, 824 (4th Cir. 1991).[1] Moreover, until the decision

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[1] Similarly, this Court has held that the practice of double celling is not *per se* unconstitutional. *See, Rhodes v. Chapman*, 452 U.S. 337 (1981); *Wilson v. Seiter*, 501 U.S. 294 (1991).

below, no court -- state or federal -- in a reported decision has held that triple celling implicates a protected liberty interest. The reason for this is clear: The practice of triple celling is unconstitutional only where the "overcrowding [is] accompanied by unsanitary and dangerous conditions ... provided an identifiable human need is being deprived." *Williams*, 952 F.2d at 824-825. Yet, in such circumstances the practice of triple celling violates the Eighth Amendment's prohibition against cruel and unusual punishment and does not violate the Due Process Clause.[2] In the present case, the inmate's grievance fails to allege unsanitary and dangerous conditions and certainly does not allege an identifiable human need is being deprived.[3] Nonetheless, even if those were the inmate's allegations, the Due Process Clause would not be implicated -- rather the Eighth Amendment would be the sole source of constitutional protection.

Because the practice of triple celling is not *per se* unconstitutional, it cannot constitute an "atypical and significant hardship" where the Eighth Amendment is not violated. In other words, the use of triple celling, where there are neither unsanitary and dangerous conditions nor the deprivation of an identifiable human need, is not an "atypical and significant hardship" so as to implicate the Due Process Clause. Yet, even if the practice of triple celling were accompanied by unsanitary and dangerous conditions or the

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[2] This Court has explained that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994).

[3] In his grievance, the Respondent alleges that smoking is excessive, that there is insufficient locker space, that there is no bed for the third inmate (he does not allege absence of a mattress), and that there is "a potential for violence." These allegations do not demonstrate an Eighth Amendment violation nor, for that matter, do they demonstrate an "atypical and significant hardship."

deprivation of an identifiable human need, then the practice does violate the Eighth Amendment and the necessity of due process protections is absolutely irrelevant and immaterial. *See*, *Phillips v. Norris*, 320 F.3d 844, 848 (8th Cir. 2003) ("[i]t is irrelevant to our Eighth Amendment analysis whether a hearing was held before conditions were imposed"). For, as the court below failed to recognize, a prisoner may not be subjected to cruel and unusual conditions even if he were provided pre-deprivation or post-deprivation due process. In effect, the Petitioner may not provide an inmate with a hearing or other process and then subject him to unconstitutional conditions. This Court in *Sandin* certainly did not intend for prisoners to be subjected to conditions constituting cruel and unusual punishment as long as they were provided due process before being subjected to such conditions. Thus, this analysis demonstrates that there is no correlation between conditions that implicate the Cruel and Unusual Punishment Clause and conditions that implicate the Due Process Clause.[4]

Where a condition such as triple celling creates a "security hazard" or a "health hazard," as alleged in this case, the practice requires only an Eighth Amendment analysis. If those allegations prove true, the conditions must be corrected and there are no due process safeguards that sanction the

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[4] To be fair, the South Carolina Supreme Court may not be alone in failing to recognize the absence of a correlation between the Cruel and Unusual Punishment Clause and the Due Process Clause. In *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), the Ninth Circuit in addressing the *Sandin* standard wrote: "We suggest that if [the district court] finds conditions in the [maximum security unit] that violate the Eighth Amendment, the transfer to the [unit] would impose "atypical and significant hardship.'" 83 F.3d at 1089. Yet, as discussed above, the Ninth Circuit failed to recognize that providing a hearing or other due process to an inmate before being transferred into unconstitutional conditions does not magically allow that inmate to be housed in those unconstitutional conditions. If there are unconstitutional conditions, it is an Eighth Amendment analysis rather than a liberty interest analysis that applies.

continued exposure to such conditions. In short, the practice of triple celling simply does not implicate a liberty interest or the Due Process Clause.

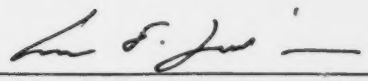
This conclusion is also evident if one considers the implications of the ruling of the court below. According to that decision, inmates in South Carolina would appear to enjoy a liberty interest in being housed in a double-occupant cell. As a result, an inmate would be entitled to seek judicial review of any decision to assign him/her to a triple cell. Moreover, the Petitioner would arguably be required to provide pre-deprivation process, i.e., a hearing, to any inmates before assigning them to triple cells. Yet, what would that pre-deprivation process be designed to address? Importantly, triple celling is not a form of punishment or disciplinary action. It is a necessity brought on by overcrowding and budgetary restrictions, and there are presently in excess of one thousand inmates in the system who are triple celled. There are no specific factors or criteria that bear on whether a particular inmate is subjected to triple celling or not; it is a discretionary process depending on available bed space and the facility to which the inmate is assigned. Thus, if the lower court's holding is permitted to stand, the Petitioner will be required to give a hearing to an inmate before assigning him/her to a triple cell although what that hearing would accomplish is unknown and on what basis the assignment to a triple cell would then be reviewed by the courts is equally unknown.

The fact that a hearing does not appear to be purposeful or required only highlights the reason that the Petitioner submits that prisoners do not enjoy a liberty interest in being free from triple celling. This further may explain why no court -- other than the court below -- has previously held that the practice of triple celling implicates a liberty interest deserving of due process protections.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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March 11, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary R. Slezak, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25887
Heard October 7, 2003 – Filed November 1, 2004

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

David M. Tatarsky, Mary Davenport Anderson, and Kelli Gregg Maddox, all of Columbia, for Respondent.

PER CURIAM: This is an appeal from two circuit court orders upholding an administrative law judge's (ALJ's) determination that he lacked jurisdiction over six grievances filed by inmate Gary Slezak (appellant). We affirm as to one grievance, affirm as modified as to four, and reverse and remand one for reconsideration in light of our decision in Sullivan v. South Carolina Dep't of

Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003). Further, we clarify the jurisdiction of the Administrative Law Judge Division (ALJD) in inmate grievance matters. In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), the Court held that inmates could pursue appellate review in the ALJD of certain grievance decisions made by the Department of Corrections (DOC). The ALJD responded to Al-Shabazz in an *en banc* order issued September 5, 2001. McNeil v. South Carolina Dep't of Corrections. In McNeil, the ALJD purported to limit its appellate jurisdiction in inmate appeals to grievances where:

> 1) the contention is that the inmate's sentence, sentence-related credits or custody status have been erroneously calculated, or
>
> 2) the inmate's created liberty interest has been taken as punishment in a major disciplinary hearing.

In footnote 5 of Sullivan, this Court substantially modified McNeil and held:

> ....the ALJD and the circuit court are instructed to look to this opinion, not *McNeil*, for guidance in future cases. Although much of *McNeil's* analysis is accurate, we believe *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] requires minimal due process when for [sic] state-created liberty interests, which are not necessarily limited to sentence credit issues and major disciplinary decisions.

See also Wicker v. South Carolina Dep't of Corrections, Op. No. 25859 (S.C. Sup. Ct. filed August 23, 2004) (recognizing another limited ALJD jurisdictional exception where inmate claims deprivation of property interest).

We now clarify that the ALJD has subject matter jurisdiction to hear appeals from the final decision of the DOC in a non-collateral or administrative matter. Al-Shabazz, *supra*. Subject matter jurisdiction refers to the ALJD's "power to hear and determine cases of the general class to which the proceedings in question belong." Cf. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) (definition of judicial subject matter jurisdiction). Further, the ALJD has appellate jurisdiction over any matter where the procedural prerequisites for perfecting such an appeal have been met. Great Games, Inc. v. South Carolina Dep't of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000) (appellate jurisdiction exists where procedural requirements met).

While the ALJD has jurisdiction over all inmate grievance appeals that have been properly filed, we emphasize that the Division is not required to hold a hearing in every matter. Summary dismissal may be appropriate where the inmate's grievance does not implicate a state-created liberty or property interest. See Sandin v. Conner, 515 U.S. 472 (1995) (due process clause offended only when inmate subjected to atypical and significant hardships in relation to ordinary incidents of prison life).

Appellant's appeals to the ALJD and to the circuit court were decided prior to our opinions in Sullivan and Wicker, and were dismissed as beyond the ALJD's jurisdiction pursuant to the McNeil order. In the interest of judicial economy, we will address this appeal on its merits.

ISSUE

Whether the circuit court erred in dismissing appellant's grievances?

ANALYSIS

We address each of appellant's six grievances below.

Appellant first complained that DOC seized certain educational cassette tapes in appellant's possession. The record reveals that the DOC policy denies inmates possession of cassette tapes other than tapes of the inmate's parole hearing(s) or religious tapes obtained from the chaplain. We find no protected liberty or property interest implicated in the DOC's decision to declare cassette tapes contraband, and to seize appellant's tapes pursuant to this policy.

Appellant also complains about a DOC policy that provides for the loss of "good time" credits in certain circumstances. The record establishes that appellant is not eligible to receive such credits, and accordingly lacks standing to challenge the DOC policy.

Appellant's third complaint relates to a DOC policy limiting the amount of legal material he could keep in his cell while in administrative segregation. The DOC determined that the retention of large amounts of paper in these cells created a fire hazard, and therefore, permitted an inmate to retain a limited amount in his cell with the remainder available upon request. Appellant concedes his materials were returned upon his release from administrative segregation to the general population. We find this grievance is moot and that, in any case, the decision to limit papers for fire safety reasons does not implicate a protected liberty or property interest.

Appellant also complained because DOC confiscated a book sent to him through the mail. Under DOC policy, inmates may receive only books mailed to them directly from the publisher for security reasons. Appellant's grievance does not involve a state-created liberty or property interest.

Appellant also challenged S.C. Code Ann. § 23-2-620 (Supp. 2004), which requires inmates convicted of certain crimes to submit a DNA sample, and § 23-3-670, requiring the person providing the DNA sample to pay a $250 processing fee. Appellant's counsel acknowledged at oral argument that appellant was challenging the constitutionality of these statutes, and that such a challenge was properly brought as a declaratory judgment action in circuit court rather than through the administrative grievance process. See e.g. Great Games, *supra*; Video Gaming Consultants, Inc. v. South Carolina Dep't of Rev., 342 S.C. 34, 535 S.E.2d 642 (2000). This grievance was properly dismissed for lack of jurisdiction[1].

Appellant's sixth grievance asserted that the practice of "triple celling" at McCormick Correctional Institute constituted both a security hazard and a health hazard to inmates. We find this grievance adequately states a violation of appellant's liberty interest so as to entitle him to a hearing before an ALJ. Accordingly, we remand this grievance appeal to the ALJD for further proceedings.

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[1] Our disposition of this grievance is without prejudice to appellant's right to pursue a declaratory judgment action in circuit court.

CONCLUSION

We hold that the ALJD has jurisdiction over all properly perfected inmate appeals, but clarify that it may summarily decide those appeals that do not implicate an inmate's state-created liberty or property interest. We affirm as modified the orders upholding the dismissal of five of appellant's complaints, and reverse and remand the triple celling complaint to the ALJD.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Doyet A. Early, III, concur.

The Supreme Court of South Carolina

December 15, 2004

Andrew F. Lindemann, Esquire
Davidson Morrison & Lindemann
P O Box 8568
Columbia, SC 29202

Re: Slezak, Gary v. SC Dept. of Corrections

Dear Counsel:

The Court has issued the following order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

Justice James E. Moore not participating.

December 15, 2004."

The remittitur is today being forwarded to the lower court.

Very truly yours,

s/ Daniel E. Shearouse

CLERK

DES/jjp

cc: Assistant Appellate Defender Aileen P. Clare
David M. Tatarsky, Esquire
Mary Davenport Anderson, Esquire
Kelli Gregg Maddox, Esquire